

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

In re: :
VALE S.A., : Docket #19cv3619
 : 1:19-cv-03619-VSB-RWL
Plaintiff, :
- against - :
BSG RESOURCES LIMITED, :
 : New York, New York
Defendant. : November 22, 2021
----- : VIDEO CONFERENCE

PROCEEDINGS BEFORE
THE HONORABLE ROBERT W. LEHRBURGER,
UNITED STATES MAGISTRATE JUDGE

APPEARANCES:

For Plaintiff: CLEARY GOTTlieb STEEN & HAMILTON LLP
BY: JEFFREY ROSENTHAL, ESQ.
SAMUEL LEVANDER, ESQ.
One Liberty Plaza
New York, New York 10006

For Third Party - ASSERSON HILLER PC
Benjamin Steinmetz: BY: YISROEL HILLER, ESQ.
NATASHA PEREIRA, ESQ.
11 Broadway, Suite 115
New York, New York 10004

Transcription Service: Carole Ludwig, *Transcription Services*
155 East Fourth Street, #3C
New York, New York 10009
Phone: (212) 420-0771
Email: Transcription420@aol.com

Proceedings recorded by electronic sound recording;
Transcript produced by transcription service.

INDEX

E X A M I N A T I O N S

<u>Witness</u>	<u>Direct</u>	<u>Cross</u>	<u>Re- Direct</u>	<u>Re- Cross</u>	<u>Court</u>
None					

E X H I B I T S

<u>Exhibit Number</u>	<u>Description</u>	<u>ID</u>	<u>In</u>	<u>Voir Dire</u>
None				

1
2 HONORABLE ROBERT W. LEHRBURGER (THE COURT):
3 All right. And, everyone, I just turned on the
4 recording so that we do make a record of this
5 proceeding, again, it is for Vale S.A. versus BSG
6 Resources Limited, 19cv3619. And counsel on for Mr.
7 Steinmetz?

8 MR. YISROEL HILLER: Yes, thank you, Your
9 Honor, my name is Yisroel Hiller, I'm counsel for
10 third party, Mr. Benjamin Steinmetz. With me on the
11 call I have my associated, Natasha Pereira, and we
12 belong to the law firm of Asserson Hiller.

13 THE COURT: All right, and I'm going to ask
14 plaintiff to put in their appearance again just so
15 it's on the recording.

16 MR. JEFFREY ROSENTHAL: Certainly, Your Honor,
17 it's Jeffrey Rosenthal of Cleary Gottlieb Steen &
18 Hamilton on behalf of plaintiff, Vale, and on the line
19 with me is my colleague, Sam Levander.

20 THE COURT: All right. So reason we are here
21 is after having entered an order granting a motion to
22 compel Mr. Steinmetz to produce documentation
23 concerning enforcement of the judgment, counsel on
24 behalf of Mr. Steinmetz wrote asking or requesting
25 that something be done essentially to intervene so

1
2 that there is a chance to oppose. And the arguments
3 that were presented appear to be two-fold, one is that
4 the underlying arbitration award was secured by fraud,
5 et cetera. I'll say right now, we're not going to do,
6 there is nothing to discuss about challenging the
7 award here, that's been entered, and the only issue
8 here is the discovery requested of Mr. Steinmetz. I
9 guess I would ask Mr. Hiller, what basis is there for
10 Mr. Steinmetz to challenge this when he was served
11 with the request back in March of 2020, did not seek a
12 protective order, which he's entitled to do as a third
13 party, and then there was a letter on a motion to
14 compel on December 8, 2020. Mr. Steinmetz did not
15 file the response. And then May 14, 2021, there was
16 supplemental briefing filed by the plaintiff and again
17 Mr. Steinmetz did not respond. And then I issued my
18 order to compel on October 15, 2021, the 14 day period
19 to move to reconsider or to file objections expired on
20 October 29th, and then your letter came in at literally
21 the 11th hour on November 10, 2021. What can you tell
22 me as to how that does not mean your client has
23 essentially waived or no longer has a right to
24 challenge anything here?

25 MR. HILLER: Yes, thank you, Your Honor. I can

1
2 start by saying that since my office has been retained
3 there's been a real effort to expedite a response and
4 certainly no effort to delay. So I appreciate that our
5 letter motion was made at the 11th hour, but that was
6 the fastest that we could get the motion in from the
7 point we were retained, which was only after Your
8 Honor's order on the motion to compel was made.

9 I think my client would be interested in
10 challenging the motion to compel and I appreciate that
11 our letter focused on his ability to challenge the
12 award but, like Your Honor said, we're here really to
13 focus on my client's ability to challenge the motion
14 to compel as a first step. And he feels that there are
15 very significant grounds on which he could challenge
16 the motion to compel, in particular, the motion and
17 the order sets out very significant holdings from
18 Steinmetz, not only that he has to comply with
19 discovery, but that he's deemed the alter ego of BSGR
20 and subject to personal jurisdiction.

21 THE COURT: Well, to be clear, I ruled that
22 there was prima facie evidence, and that's all that's
23 required in this instance to get that discovery. I did
24 not find as a matter of law and fact that he is, in
25 fact, the alter ego, what I found is that there's

1
2 sufficient evidence to go forward with the discovery.

3 MR. HILLER: Your Honor is absolutely correct,
4 I'm sorry for misstating that. I think my client
5 would still be interested in making sure that there's
6 no order on the record which suggests that there is a
7 level of evidence establishing him as an alter ego or
8 subject to jurisdiction. But just to the points Your
9 Honor --

10 THE COURT: He may be interested but why
11 didn't he do something about it for over a year?

12 MR. HILLER: Right, so that, that's what I was
13 about to get to. As I said, I was only retained after
14 Your Honor's order was made. So what I would speak to
15 before the order is really what I've been told as
16 opposed to what I know firsthand. My understanding is
17 that all of these documents, including the motion,
18 were served by email on Mr. Steinmetz. I don't know
19 and I haven't looked at the issue of whether that sort
20 of service is appropriate in the circumstances, but
21 we're dealing with a foreign third party in an effort
22 to enforce a foreign arbitration award. It may be that
23 there's a service requirement which is different than
24 email under the Hague Convention, for example, or
25 where the, where Vale would have to seek permission to

1
2 serve by email.

3 In any case, my understanding is that when Mr.
4 Steinmetz was made aware of the issue, his counsel at
5 the time advised him that it was better for him not to
6 respond than it was to potentially subject himself to
7 jurisdiction. Once I was instructed, well, I should
8 say after Your Honor made an order compelling Mr.
9 Steinmetz to respond and we were retained, Mr.
10 Steinmetz understood the seriousness of the issue and
11 of the issues involved or that led to the order and
12 instructed us to move the Court respectfully for the
13 opportunity to be heard on those issues.

14 THE COURT: All right, Mr. Rosenthal, do you
15 wish to respond?

16 MR. ROSENTHAL: Yes, Your Honor. On this point
17 regarding service, just so, maybe Mr. Hiller isn't
18 aware of what the left hand is telling the right hand,
19 but his firm, itself, was actually served with all
20 this. Back in March, March 21 -- March 31, 2020, not
21 only did we serve Mr. Steinmetz personally and by
22 email, but we took every known lawyer that we had that
23 had represented Mr. Steinmetz in any matter and we
24 sent it to them as well. And his partner, Baruch
25 Baigel of the Asserson firm, was served by FedEx and

1
2 by email with this. So the notion that the Asserson
3 firm was first aware of this right now, the Asserson
4 firm has been representing Mr. Steinmetz in the
5 litigation in London for the past several years. So,
6 you know, Mr. Steinmetz has certainly had access to
7 them, and Mr. Hiller, for all that time, and the fact
8 that he strategically chose not to appear contests,
9 you know, he read the litany, Your Honor, of things
10 that, opportunities that he's had. And certainly, even
11 if Mr. Hiller first came on the scene after Your Honor
12 entered the order on October 15th, the Federal Rules
13 gave him two weeks to file a motion for
14 reconsideration at that point. And, you know, these
15 time deadlines are not secrets and they're there for a
16 reason, and the fact that Mr. Steinmetz had chosen to
17 ignore all of them, including the latest one with
18 respect to reconsideration, doesn't open the door for
19 him to come in, ignore the deadline for production and
20 then say now I want to challenge all the things that
21 don't have anything to do with the arbitration award.
22 If he wanted to contest jurisdiction he could have
23 done that for the last year and a half, if he wanted
24 to contest the alter ego question he could have done
25 that for a year and a half. And as you noted, Your

1
2 Honor, there's no finding yet that he's an alter ego,
3 there's a finding that there's a prima facie showing
4 that subjects him to discovery and, therefore, he
5 should produce that discovery and the next step down
6 the road, which he'll have every opportunity to
7 contest, is if we believe that the discovery does show
8 that we can make out a case of alter ego, we'll have
9 presumably a contested hearing over that very
10 question. So that still is preserved for Mr. Hiller
11 and Mr. Steinmetz.

12 THE COURT: All right, Mr. Hiller, do you wish
13 to say anything further?

14 MR. HILLER: I do, thank you, Your Honor. I
15 just wanted to clarify two issues. One is it's correct
16 to say that my partner, Baruch Baigel, has been
17 dealing with the arbitration and litigation in the UK.
18 I haven't been involved in that at all. I'm
19 representing Mr. Steinmetz in the US, that's why I've
20 been instructed, because I am qualified to represent
21 Mr. Steinmetz in the US and my partner is not. I have
22 not spoken to my partner about whether he was served
23 or not.

24 In any case, I think the fact that there's a
25 prima facie showing here is something that deserves to

1

10

2 be challenged because it's based entirely on the
3 notion that New York law assumes, or in this case on
4 the basis of the facts considers that Mr. Steinmetz is
5 the alter ego of BSGR. But I think that it's really an
6 open issue in the Second Circuit and in this district
7 whether New York law should be used to govern that
8 standard.

9 A number of the cases that are referred to in
10 Vale's motion to compel and various other cases we've
11 seen in our research, make very clear that it's an
12 open issue whether New York law should be applied or
13 the law of the state of incorporation. BSGR is
14 incorporated in Guernsey, my client is domiciled in
15 either France or Israel, and so we would like the
16 chance to argue that the law of either Guernsey, or
17 France, or Israel applies in respect of being able to
18 make, to show a prima facie showing of alter ego.

19 THE COURT: Mr. Rosenthal, can you address
20 that?

21 MR. ROSENTHAL: So, Your Honor, yeah, as the
22 Court knows, in the absence of a conflict between New
23 York law and foreign law, the Federal Court in New
24 York applies New York law. Even now we are a month
25 and a half after the Court's entered its order, we

1

11

2 still don't have Mr. Steinmetz, even at this date,
3 coming in and saying that there is a conflict such
4 that this Court should not apply the local law. And
5 again, this goes to just the prima facie showing right
6 now. He'll have an opportunity after discovery to
7 contest fully, you know, whether we can then prove
8 that Mr. Steinmetz is an alter ego and what law
9 applies and whether there's a conflict between local
10 law and Guernsey law. So I think that the argument
11 now is both premature and it's also time barred
12 because, again, it's Mr. Steinmetz' decision to have
13 ignored this until whatever date they decided to hire
14 or he decided to hire Mr. Hiller. And the law doesn't
15 excuse him, especially when he's had access to
16 multiple firms, he's had other New York counsel, in
17 fact, who were also served by us to make sure that the
18 message was getting through of what we were seeking to
19 do and, you know, having passed the deadline even for
20 reconsideration, now is not the time to contest
21 whether we've made a prima facie case out.

22 THE COURT: Okay. Any final words, Mr.
23 Hiller?

24 MR. HILLER: No, I don't think so. Aside from
25 Mr. Rosenthal's point that we haven't explained a

1

12

2 conflict or potential conflict between New York law
3 and Guernsey law with respect to neither he, nor I, or
4 Guernsey lawyers, I am qualified as an English
5 solicitor, but even that doesn't give me any license
6 or knowledge in respect of Guernsey law. But I think
7 it's a very central issue to Your Honor's holding and
8 to Vale's motion. It wasn't vetted at all in their
9 motion. They just cited to an assumed that New York
10 law would apply and Your Honor made his order on the
11 basis of their argument. I think it's an issue that's
12 important and that my client would like to have the
13 chance to address.

14 THE COURT: All right, thank you, all, I'm
15 ready to rule from here. The interested party, Mr.
16 Steinmetz, as I said, had numerous opportunities to
17 seek a protective order, respond to motions to compel
18 and ultimately to challenge the order that I issued.
19 He strategically chose not to during any of those
20 periods, all those periods expired and so he's
21 precluded from challenging the order that I issued.
22 And as I said, it is a prima facie showing, it has not
23 been established as fact as to whether he's alter ego,
24 and he will, as Mr. Rosenthal has pointed out,
25 ultimately have the opportunity to address that issue

1

13

2 should he challenge it down the line at an appropriate
3 point. But for discovery purposes, the plaintiff has
4 established and met the standard that's required for
5 that purpose and if there are issues of which law
6 applies to determine alter ego ultimately, again, that
7 will come in later on, but right now we are dealing
8 with the enforcement of the judgment pursuant to New
9 York procedures for enforcing judgments and no one and
10 nothing before me suggests that any other law applies
11 right now other than New York.

12

13 So that's where we are and the order stands
14 and, you know, if Mr. Steinmetz needs to put in an
15 appearance at some point or wants to take a step down
16 the road, he can do so. I guess he has here
essentially as an interested party.

17

18 All right, anything else? Anything else from
the plaintiff?

19

20 MR. ROSENTHAL: Yeah, I guess, Your Honor, the
21 order now standing, the order required compliance by
22 the 10th of November and we'd like to know, because
23 obviously to the extent that Mr. Steinmetz is going to
24 comply promptly, we would respectfully move for
25 various sanctions. And I just want to know if the
Court is resetting a new date for his full compliance

1 14

2 or whether he's in a state of noncompliance at this
3 time.

4 THE COURT: Mr. Hiller, can you address
5 whether your client will comply and, if so, when?

6 MR. HILLER: He will comply, he has no
7 intention of being in violation of an order beyond the
8 history Your Honor's recounted. I think it would be
9 helpful, the discovery requests, there's more than 55
10 of them, a lot of them would require our client to
11 assess and then be able to collect documents from
12 third parties that may or may not be under his
13 control. It would be very helpful, respectfully, if my
14 client could have 30 days to respond to the discovery
15 requests.

16 THE COURT: I think that's fine. I'm not going
17 to impose sanctions right now. Obviously, if the, if
18 Mr. Steinmetz delays or is recalcitrant in any way,
19 I'll certainly reconsider the imposition of sanctions,
20 but we'll say 30 days from today is December 22nd, so
21 he must comply by that date.

22 Anything else? Anything else, Mr. Rosenthal?

23 MR. ROSENTHAL: No, Your Honor, thank you for
24 your time today.

25 THE COURT: Mr. Hiller?

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

15

MR. HILLER: No, thank you very much, Your Honor.

THE COURT: Anything from BSG?

ATTORNEY FOR DEFENDANT: No, thank you, Your Honor.

THE COURT: All right, thank you, all, we're adjourned. Have a very happy holiday to all, and be well.

(Whereupon the matter is adjourned.)

C E R T I F I C A T E

I, Carole Ludwig, certify that the foregoing transcript of proceedings in the United States District Court, Southern District of New York, Vale S.A. versus BSG Resources Limited, Docket #19cv3619, was prepared using PC-based transcription software and is a true and accurate record of the proceedings.

Signature Carole Ludwig

Carole Ludwig

Date: December 1, 2021